

MUNICIPAL INCORPORATION AND ANNEXATION: RECENT LEGISLATIVE TRENDS

DANIEL R. MANDELKER*

Increasing awareness of the defects of permissive incorporation and restrictive annexation statutes, as they affect large urban areas, has focused public attention on legislative correction of these deficiencies. This article will review and assess recent legislative changes in this area of public concern. As the writer has stated elsewhere, the problem is largely one of drafting new standards to guide incorporations and annexations, and of providing improved administrative techniques by which they may be implemented. But while the problem might possibly be stated in so simple a fashion, the finding of a practicable solution is not nearly as easy.

To a large extent, the problems of annexation and incorporation now center in the smaller metropolitan areas found primarily outside the older and more mature concentrations along the eastern seaboard. Statistically, this observation is confirmed by a recent survey which indicates that while metropolitan areas having a central city of 1,000,000 or over possessed the greatest number of incorporated places, the rate of growth was highest in the metropolitan areas further down the scale.¹ In view of the considerable expansion of population expected to occur in urban concentrations within the next two decades, the pattern of municipal corporate growth would indicate that immediate legislative action is needed with reference to the smaller areas if the extreme fragmentation² of the larger centers is not to be repeated.³ This comment is particularly pertinent to many cities in

* Associate Professor of Law, Indiana University.

¹ Hawley, "The Incorporation Trend in Metropolitan Area, 1900-1950," 25 Journ. A.I.P. 41 (1959). In the 1940-1950 decade, Standard Metropolitan Areas (hereafter, SMA), with a central city of 1,000,000 or more had an average of 149.4 incorporated places, while the nearest category had an average of only 51.2 incorporated places. However, the rate of accumulation of incorporated municipalities has been greatest in SMA's having central cities with populations between 100,000 and 250,000, and between 500,000 and 1,000,000. In the 1945-1949 period, for example, the percentage increase was 16.6 in the second group, as compared with 2.0 in the over 1,000,000 group.

² Hawley noted a resurgence of incorporations in the post-1950 years which equalled an earlier period of considerable growth in 1905-1909. Hawley, *supra* note 1, at 42. Also of note is the fact that in the last census decade 11 SMA's contained three-fourths of all the places incorporated during that period. *Id.*

³ This development is vividly evident in the Milwaukee area, where a series of 12 incorporations since 1950 has brought the entire county within the jurisdiction of the incorporated municipalities. Wisconsin Metropolitan Study Commission, Committee on Land Use and Zoning, Report on Municipal Boundary Problems 7, Maps 1-5 (1959).

the midwest, whose comparative isolation and smaller size have so far prevented the fragmentation by incorporation that is characteristic of the continuous built-up areas in the East.

MANIFEST DESTINY, GREEN BELTS, AND URBAN GROWTH

A survey of this type might well be preceded by a brief characterization of the general assumptions underlying the reform of incorporation and annexation legislation. Most opinion in the United States advocates supportive legislation which would recognize the "Manifest Destiny"⁴ of the large urban central city.⁵ A good example is provided by the statutes, becoming increasingly common, which prohibit the incorporation of new municipalities within a certain distance of large cities. Not only does this legislation recognize the fact that new incorporations have been "moving in" geographically on the large metropolis,⁶ but it represents a legislative policy, explicitly recognized by the Iowa court in upholding such a statute, that the growth of large cities shall not be restricted.⁷ Underlying this attitude is the further assumption, not always made explicit, that the governmental organization of a large urban area can often be best rationalized by the peripheral expansion of the central city. This assumption is implicit, for example, in annexation statutes which make the good of the annexing community an important factor to be considered in passing on the desirability of an annexation ordinance.⁸

English policy presents a different set of assumptions. There,

⁴ The phrase is Dean Fordham's.

⁵ A contrary opinion was voiced by a California legislative committee, which found that the California incorporation laws were satisfactory short of some necessary procedural revisions. Final Report of California Assembly Interim Committee on Municipal and County Government 6 (1959). This conclusion should be compared with a recent study which finds virtually no control exercised over the desirability or feasibility of a municipal incorporation in California. Comment, 4 U.C.L.A.L. Rev. 419 (1957). Some witnesses before the Committee had called for the imposition of standards. Vol. I, Hearings on Incorporations before California Assembly Interim Committee on Municipal and County Government, 69-72; Vol. II, pp. 5-8 (1958).

⁶ Hawley, *supra* note 1, at 44. Before 1900 a radius of 35 miles was needed to embrace 94% of all incorporated places. In the last decade 94% of all new incorporations were located within 25 miles of the central city.

⁷ *In re Town of Avon Lake*, 249 Iowa 1112, 88 N.W.2d 784 (1958). The California Committee recognized that the threat of annexation was the "principal underlying motive" behind many of the recent incorporations in that state. California Report, *supra* note 5, at 9, 10. In California the incorporation boom has fostered the growth of community consultants who "sell" the incorporation idea. *Id.* at 16-18. As one such witness testified, "We take the campaign from the beginning and handle all phases of it." *Id.* at 17.

⁸ *E.g.*, Ind. Ann. Stat. § 48-701 (Burns Supp. 1959). See also the court's comments in *City of Gould Spring v. Laycock*, 312 S.W.2d 882 (Ky. 1957).

county planning authorities have been encouraged to encircle the larger cities with Green Belts. More properly these are land use zones several miles wide and within which urban development outside existing villages is to be severely restricted.⁹ Some cities in the 200,000 range have been so treated. In part, the object is to restrict the further expansion of the cities that are so girdled. Recent statutory experiments in California have proceeded along similar lines.¹⁰ In England the underlying policy is that absolute size has disadvantages so serious as to be avoided at the cost of additional urban fragmentation, which has express sanction in government New Town and town development schemes beyond the Green Belt. Local government reorganization in England is presently being carried out regionally by national boundary commissions which accept the Green Belt limitations. This *ad hoc* approach for all practical purposes has superseded the consideration of incorporations and annexations on an isolated and individual basis.

Considerable differences between English and American local government structure make comparisons difficult. For one thing, the English county has in recent years been given important urban governmental functions and is not strictly comparable to its American counterpart. English policy would nevertheless suggest that there is no necessary case for a continued increase in city size, although the application of a restrictive policy to a medium-sized community under the 1,000,000 mark is open to question. Part of the difficulty lies in the lack of adequate data on which to base such a policy.¹¹ In addition, English experience might indicate that incorporation and annexation legislation can provide only a limited solution if considered apart from the organizational problems of metropolitan government as an entity. The writer has detailed these considerations elsewhere.¹² Ultimately, parts of the urban periphery may have to be organized

⁹ Ministry of Housing and Local Government, Circular 42/55. The English Circular contemplates that vacant sites within existing villages should be built upon as an alternative to peripheral expansion. Compare the somewhat contrary American assumption in *Faris v. City of Caruthersville*, 301 S.W.2d 63, 69 (Mo. App. 1957): "The city council should not attempt to control . . . the location of the people's homes or businesses."

¹⁰ California has experimented with a law under which an area may be zoned exclusively for agricultural uses and then may not be annexed without the consent of the owners. See Cal. Govt. Code § 35009 (1955). This legislation is reviewed in California Assembly Interim Committee on Conservation, Planning, and Public Works, Subcommittee on Planning and Zoning, Preliminary Report on State Greenbelt Legislation and the Problem of Urban Encroachment on California Agriculture (1957).

¹¹ See Lillibridge, "Urban Size: An Assessment," 28 Land Econ. 341 (1952).

¹² "Standards for Municipal Incorporations on the Urban Fringe," 36 Texas L. Rev. 271 (1958).

separately but within the framework of a metropolitan or regional organization. In the meantime, and particularly in view of the stage of urban development in the midwest, the encouragement of the peripheral expansion of the medium-sized cities coupled with the comparative discouragement of suburban incorporation appears to be the best possible solution.

RECENT INCORPORATION LEGISLATION

Recent decisions involving the attempted incorporation of villages in Ohio put the problems involved in these cases into focus. Perhaps the *Franklin Heights* case is most illustrative.¹³ In this case the court rejected the attempted incorporation of an area over 22 miles square, surrounding the City of Columbus in the shape of a U. Under the Ohio statutes a village incorporation may be rejected if it is not "just, right and equitable," and the court seemed primarily to be moved by the difficulties the new village would face in attempting to provide sewage and other municipal services. While service difficulties were recognized to be a consequence of the unusual shape, the court of appeals was also influenced by the suburban character of the area to be incorporated. Like many areas on the fringes of medium-sized cities it was but partially developed, residential subdivisions were scattered, and land was primarily still in agricultural use. The decision possibly implies that scattered dormitory developments are not entitled to incorporate, particularly when they are in a semi-urban state, and that in any event the future of such areas lies more properly with the adjoining large city.¹⁴

Incorporation legislation in Indiana and Minnesota has attempted to remove the necessity for *ad hoc* judicial decision by providing a statutory code that puts competing interests in balance.¹⁵ The Indiana legislation deals primarily with incorporation, but had been preceded by earlier statutory changes that strengthened the annexation powers

¹³ *Hoye v. Schaefer*, 148 N.E.2d 532 (Ohio C.P. 1958), *aff'd*, 157 N.E.2d 140 (Ohio Ct. App. 1959). See also *Baumhardt v. Mitchell*, 107 Ohio App. 209, 157 N.E.2d 898 (1958), rejecting the incorporation of a long, narrow strip of land on the ground, in part, that the municipality would "present perpetual problems relating to streets and public utility services."

¹⁴ See the decision of the Court of Common Pleas, which notes the implicit concession of the incorporators that without annexation the area could not get sewers and water, and then notes that without such services a health menace might result. Perhaps the court had in mind the policy of the City of Columbus not to extend sewage to areas outside the city.

¹⁵ Both statutes resulted from legislative studies. The Indiana study was carried out by a committee acting under a resolution of the Legislative Advisory Commission, the Minnesota study by a Commission which was authorized by Minn. Laws c. 833 (1957).

of cities.¹⁶ In Minnesota the statute was part of a wholesale reform of municipal incorporation and annexation law. As compared with existing legislation, both the Minnesota and Indiana laws attempt to draft standards for municipal incorporations that give proper heed to the problems of organizing local government in metropolitan areas. Both improve the procedures available to test municipal incorporations, and both place the final decision on an agency which stands impartial as to the conflicting interests involved.

Under the Minnesota legislation procedural innovation has been obtained by the creation of a Municipal Commission at the state level with the power initially to pass on municipal incorporations.¹⁷ While the power to incorporate in Indiana is left as before with the county commissioners, copies of the incorporation petition are to be sent to the state agency having planning advisory functions and to the planning commission having jurisdiction of the area involved.¹⁸ Each of these agencies is to file an advisory report with the county commissioners, using the standards for incorporation provided by the statute. Under the Minnesota law the Municipal Commission has the power to enact "reasonable" regulations,¹⁹ and the report of the study commission which proposed the legislation echoes the hope that the Commission will be able to evolve rules and standards in application of the statutory tests that have been adopted.²⁰

In defining the standards to be applied to new incorporations

¹⁶ For the new Indiana law, see Ind. Laws c. 240 (1959), which may be found beginning at Ind. Ann. Stat. § 48-101 (Burns Supp. 1959). The 1953 city annexation amendments may be found at Ind. Ann. Stat. §§ 48-701, 48-702 (Burns Supp. 1959), and the new law also amends the town annexation statutes to bring them into line with the city amendments.

¹⁷ For the new Minnesota law, see Minn. Laws c. 686 (1959), which may be found beginning at Minn. Stat. Ann. § 414.01 (West Supp. 1959). Only in counties having first or second class cities or in metropolitan areas as defined for regional planning purposes must all incorporation petitions be referred to the Municipal Commission. In other areas, an existing municipality within one mile of the proposed incorporation may petition the district court for a determination that its interest is so substantial that the incorporation petition should be referred. Minn. Ann. Stat. § 414.02(1) (West Supp. 1959). Differential provisions of this type were contemplated for the Indiana law, but it was finally decided to draft an all-embracing code whose more restrictive sections would automatically fail to apply in rural areas. Different procedures for rural areas were added to the proposed bill by the Minnesota legislature.

¹⁸ Ind. Ann. Stat. § 48-105 (Burns Supp. 1959). Under the Minnesota law the incorporation petition is to be referred to "any duly constituted municipal or regional planning commission exercising authority over all or part of the area." Minn. Stat. Ann. § 414.02(2) (West Supp. 1959).

¹⁹ Minn. Stat. Ann. § 414.01 (West Supp. 1959).

²⁰ Report of the Commission on Municipal Annexation and Consolidation 16 (1959).

both statutes start implicitly with the assumption that only an adequate "community" is entitled to incorporate. Both reject a comprehensive definition of community in favor of an itemization of the specific factors which are thought to be the necessary ingredients of municipal entity. While the factors listed in each statute are several, they fall into the following three categories: (1) factors testing the nature of the area seeking incorporation; (2) factors testing the ability of the area to provide necessary governmental services; and (3) factors testing the effect of the incorporation on the existing governmental structure in the wider community of which the area seeking incorporation is a part.

The Minnesota law retains the test, found in its previous statute, that the area to be incorporated be "so conditioned as to be properly subject to municipal government."²¹ The statute then lists eight factors about which the Municipal Commission is to make findings but it does not specify what findings the Commission must make. In this way, as indicated above, the elaboration of criteria based on these factors will be left to the Commission as it gains experience. For example, the Commission is to make findings about population and area, but the statute does not specify what particular finding on the question of area and population will suffice to permit the incorporation of a municipality. An inquiry into the urban nature of the community seeking incorporation is contemplated, however, by the inclusion of factors requiring the Commission to consider the area and assessed value of platted in relation to unplatted land. Past and prospective expansion is also to be considered, along with the "necessity and feasibility of providing governmental services." The petition is to be denied "if it appears that annexation to an adjoining municipality would better serve the interests of the area." If the petition is confirmed the Commission is to order an election in the area seeking to incorporate.

Under the Indiana legislation the tests are similar, but the county commissioners must be satisfied that several specified conditions exist. In this respect, the legislation differs slightly from that enacted in Minnesota.²² The land area of the proposed new municipality must be "urban in character," must be reasonably compact and contiguous, and must include enough undeveloped land to allow for future growth.²³ A "substantial majority" of the incorporators must agree

²¹ Minn. Stat. Ann. § 414.02(3) (West Supp. 1959). For a discussion of the cases arising under the prior law see Standards, *supra* note 12, at 277, 278, 282-289.

²² In the absence of an administrative commission on the Minnesota model, firmer legislative control is justifiable.

²³ The last-mentioned standard codifies the generally prevailing judicial rule. Standards, *supra* note 12, at 282-285.

to the provision of six from a list of major municipal services, and these must be capable of being financed by a "reasonable" local tax rate. Finally, incorporation must serve the "best interests of the territory involved." In making this last determination the commissioners are to be guided in part by the expected growth and governmental needs of the surrounding area of which the particular territory is a part, and by the extent to which services and regulatory functions can be provided more adequately and more economically by an existing unit of government. The commissioners have the power to incorporate; no election is provided.²⁴

Perhaps the most striking feature of these legislative innovations²⁵ is the recognition that the newly-incorporated unit should be financially viable and should be able to make a contribution to the government of the larger metropolitan area. This assumption is explicit in the Indiana statute, and while less explicit in the Minnesota law the intent of the study commission which drafted it lies definitely in this direction.²⁶ In short, the dormitory bedroom community, incorporated only to prevent annexation, will ordinarily no longer be possible. From this perspective these statutes represent a purposeful choice that rejects balkanization as a solution to the problems of local government organization.

The writer has noted elsewhere the difficulties involved in most states in seeking the judicial review of municipal incorporations, and has recommended that the best solution is to provide for specialized review proceedings.²⁷ The Indiana law retains the concept of a specialized review procedure which is part of its history, and makes applicable the statute providing generally for the judicial review of administrative action by local governmental bodies.²⁸ The Minnesota statute provides for the judicial review of the Commission's orders, and appears wide enough to permit a scrutiny of the decision on the law and on the facts.²⁹ While these provisions might be challenged as

²⁴ However, the proceedings may be stopped by a remonstrance by 51% of the property owners in the area, or by the owners of 75% of the assessed real estate valuation. Ind. Ann. Stat. § 48-107 (Burns Supp. 1959).

²⁵ For recent judicial pronouncements on this problem, compare *Petition to Incorporate the City of Duquesne*, 322 S.W.2d 857 (Mo. App. 1959), with *In re Incorporation of Village of Oconomowoc Lake*, 97 N.W.2d 189 (Wis. 1959). For recent instances of judicial refusal to consider the merits of the incorporation see *Attwood v. County of Wayne*, 349 Mich. 415, 84 N.W.2d 708 (1957); *Port of Tacoma v. Parosa*, 52 Wash. 2d 181, 324 P.2d 438 (1958).

²⁶ *Supra* note 20, at 15.

²⁷ "Municipal Incorporation on the Urban Fringe: Procedures for Determination and Review," 18 La. L. Rev. 628 (1958).

²⁸ Ind. Ann. Stat. § 48-109 (Burns Supp. 1959).

²⁹ Minn. Stat. Ann. § 414.07 (West Supp. 1959).

an unconstitutional delegation of legislative power if the standards have been drawn too widely, the detailing of subsidiary factual criteria on which the final judgment is to be based seems to preclude this event.³⁰

RECENT ANNEXATION LEGISLATION

A recent publication by the American Municipal Association has perceptively reviewed all of the state annexation statutes.³¹ While the availability of this work as a sourcebook renders superfluous any similar attempt at a comprehensive coverage in this article, a review of some of the recent legislative trends in this area may still be helpful.³²

³⁰ See the discussion in *Procedures*, *supra* note 27, at 629-634. In this connection consider two of the standards that were suggested for the Indiana law:

"(b) The land area of the proposed town must be such as to allow for a comprehensive zoning plan which contemplates the allocation of territory for balanced residential, commercial, and industrial uses. . . .

(d) Incorporation shall be allowed only if it is found that it will substantially improve the level of governmental services in the area seeking incorporation."

Memorandum to Indiana Study Commission on Town Incorporation and Annexation Laws 1 (Mimeo, October 23, 1957).

Both the Minnesota and the Indiana statutes provide for notice to be sent to the township and county from which the proposed new municipality is to be carved, and the Indiana statute makes them party to the proceedings. In Minnesota they may submit briefs prior to the hearing. Under the Indiana statute, notice is also to be given to any existing towns or cities within three miles of the limits of the proposed town. Ind. Ann. Stat. §§ 48-106, 48-107 (Burns Supp. 1959); Minn. Stat. Ann. § 414.02(2) (West Supp. 1959). Particularly in view of the difficulties the problem of parties in interest has presented in Ohio incorporations, these statutory changes deserve attention. Minnesota has properly extended similar provisions to annexation proceedings. Minn. Stat. Ann. § 414.02(2) (West Supp. 1959).

³¹ Dixon and Kerstetter, *Adjusting Municipal Boundaries: The Law and Practice in 48 States* (Tentative ed. 1959). For individual articles of merit see Bain, "Annexation: Virginia's Not-So-Judicial System," 15 Pub. Admin. Rev. 251 (1955); Bain, "Terms and Conditions of Annexation Under the 1952 Statute," 41 Va. L. Rev. 1129 (1955); Cutler, "Characteristics of Land Required for Incorporation or Extension of a Municipality," 1958 Wis. L. Rev. 6; Fordham and Dwyer, "Municipal Incorporation and Territorial Changes in Ohio," 13 Ohio St. L.J. 503 (1952); Comment, 19 U. Kan. City L. Rev. 186 (1951) (Missouri law); Note, 39 Minn. L. Rev. 553 (1955).

³² Several subsidiary but important problems deserve brief mention at this point:

- (1) Most annexation statutes are not sufficiently tight so as to prevent strip annexations, e.g., the annexing of a narrow street corridor in order to reach out and grab a large but isolated residential or industrial development.
- (2) Most statutes do not explicitly authorize annexations across county lines. In the age of the automobile, this lack of authority is unrealistic.
- (3) Most statutes have not faced up to the problem of defensive incorporations. One solution is provided by the Indiana law. No new incorporations and no annexations by other municipalities are now permitted within four miles of a first class city (Indianapolis) and within three miles of the second and third class cities. Ind. Ann. Stat. §§ 48-110, 48-114 (Burns Supp. 1959).

Most annexation statutes do not contain standards to guide the annexation process, and many make annexation a question for local determination by leaving the ultimate decision to the voters in the area sought to be annexed. Since annexation usually means higher urban taxes, frequent rejection is easily understandable. The continuation of procedures under which the area to be annexed retains an effective veto can only check the future growth of the central city. In recent years, however, some state legislatures have recognized the case for city expansion. As a recent North Carolina report on annexation suggests, sound urban government requires a city whose urban boundaries include a tax and geographic base upon which the necessary services and functions can be rested.³³ The question then becomes one of writing legislation which will implement this decision while providing safeguards for the area to be annexed. A statute along these lines is not easy to draw. Legislative changes in Indiana, North Carolina, and Minnesota have recently been carried out on this basis, the Virginia statute has long reflected a similar choice, and the Missouri courts have developed comparable tests with little explicit legislative direction.

The Missouri law permits a city to annex by ordinance, but since 1953 has required that a declaratory judgment action be filed by the annexing city in which the validity of the annexation is to be tested. On the merits, the statute requires primarily that the annexation be "reasonable and necessary to the proper development of the city."³⁴ While subsidiary criteria are not elaborated, the Missouri courts prior to 1953 had developed more specific standards relating in part to the determination of whether the property sought to be annexed was ready for annexation.³⁵ These standards have been held to be

Cities may annex any towns incorporated after the date of the act. Ind. Ann. Stat. § 48-111 (Burns Supp. 1959). See also Ind. Ann. Stat. § 48-108(d)(3) (Burns Supp. 1959).

³³ Report of the Municipal Government Study Commission 1-5 (1959).

³⁴ Mo. Ann. Stat. § 71.015 (Vernon Supp. 1959).

³⁵ For representative Missouri cases, see *Faris v. City of Caruthersville*, 301 S.W.2d 63 (Mo. App. 1957); *Mauzy v. City of Pagedale*, 260 S.W.2d 860 (Mo. App. 1953); *Dressel v. City of Crestwood*, 257 S.W.2d 236 (Mo. App. 1953); *Ozier v. City of Sheldon*, 218 S.W.2d 133 (Mo. App. 1949); *Jones v. City of Ferguson*, 164 S.W.2d 112 (Mo. App. 1942); *Algonquin Golf Club v. City of Glendale*, 230 Mo. App. 951, 81 S.W.2d 354 (1935); *Bingle v. City of Richmond Heights*, 68 S.W.2d 866 (Mo. App. 1934); *State ex inf. Mallett ex rel. Womack v. City of Joplin*, 332 Mo. 1193, 62 S.W.2d 393 (1933); *State ex inf. Major v. Kansas City*, 233 Mo. 162, 134 S.W. 1007 (1911) (leading case). The Missouri rules are in turn derived from the leading Arkansas case of *Vestal v. City of Little Rock*, 54 Ark. 321, 15 S.W. 891 (1891). For a recent elaboration of these tests by the Arkansas court see *Louallen v. Miller*, 317 S.W.2d 710 (Ark. 1958).

Unlike Ohio Home Rule cities, *Schultz v. City of Upper Arlington*, 88 Ohio App.

relevant under the present law.³⁶ They require that the land involved must be subject to sale as town lots, whether platted or not, must have a market value indicating their ripeness for town development, must be needed for town purposes, or must be developed as an urban community. These tests thus cover the problem of timing with reference to agricultural land, which is one of the crucial questions for annexation policy to resolve.

If a farm is platted the Missouri test has been met, but the city may often have a need to annex before platting takes place. Taking cognizance of the fact that land is more valuable for residential than for farm purposes the Missouri courts are prepared to consider evidence as to value when deciding on an annexation.³⁷ Inherent in this standard is the assumption that much land on the periphery of a community does meet this test, and the Missouri courts have not found it difficult to uphold the annexation of farm land when the other pertinent criteria have been met.³⁸ In this connection they have paid attention to the need of the annexing city, particularly in relation to the availability within the city of vacant land sufficient to meet its probable need to expand.

Other statutes impose a standard as broad as that in the Missouri law, though sometimes in connection with more explicit criteria.³⁹ In

281, 97 N.E.2d 218 (1950), Missouri and Texas Home Rule cities may annex without the benefit of a statute by virtue of the constitutional Home Rule provision. *State ex inf. Taylor ex rel. Kansas City v. North Kansas City*, 360 Mo. 374, 228 S.W.2d 762 (1950); *State ex rel. Pan American Production Co. v. Texas City*, 157 Tex. 450, 303 S.W.2d 780 (1957). While annexations by Missouri Home Rule cities appear to be governed by the tests applicable to other municipalities, Texas Home Rule cities may annex regardless of the use and character of the area involved. Constitutional Home Rule amendment is thus another approach to annexation reform, although the enactment of a balanced statutory code that can work out the difficult problems that are involved appears preferable.

³⁶ *City of Fulton v. Dawson*, 325 S.W.2d 505 (Mo. App. 1959); *City of St. Joseph v. Hankinson*, 312 S.W.2d 4 (Mo. App. 1958); *City of St. Ann v. Buschard*, 299 S.W.2d 546 (Mo. App. 1957).

³⁷ *E.g.*, *Faris v. City of Caruthersville*, 301 S.W.2d 63 (Mo. App. 1957). Accord, *Town of Brookfield v. City of Brookfield*, 274 Wis. 638, 80 N.W.2d 800 (1957). Nor must all of the tests laid down by the Missouri courts be met. Under an overriding umbrella of "review for reasonableness" the decisions have maintained a commendable fluidity. See *Dressel v. City of Crestwood*, 257 S.W.2d 236 (Mo. App. 1953).

³⁸ *Faris v. City of Caruthersville*, 301 S.W.2d 63 (Mo. App. 1957), approving the annexation of a tract devoted solely to farming purposes and even though the farmer did not want to sell.

³⁹ Three examples will suffice. The Virginia statute is best-known, and makes the "necessity for and expediency of" the annexation the prime test. Va. Code §§ 15.152.2-15-152.28 (Supp. 1959). Kentucky courts are to consider the "best interests" of the annexing city and whether a "manifest or material injury" will be caused to owners of real property in the area involved. Ky. Rev. Stat. §§ 81.100-81.280 (Baldwin Supp.

these cases the relative importance of the Missouri standard is difficult to define, and in any event a test of this variety presents several problems. Apart from possible constitutional objections,⁴⁰ the granting of such wide freedom to the deciding agency is perhaps open to question. Nor is this solely because of possible infringement on the interests of those opposing annexation. Indiana, for example, requires as one of its statutory tests that the land to be annexed be "urban," and there is no assurance that judicial interpretation will always be as realistic as it is in Missouri.⁴¹

Minnesota and North Carolina have attempted to impose more specific tests. Minnesota retains the general standard, that the annexation be for the "best interest" of the area concerned, and that the property to be annexed be "conditioned" so as to be ready for municipal government. On the issue of readiness, as in the incorporation law, it elaborates the subsidiary criteria which are to serve as a guide in making the basic decision. These criteria refer to the area to be annexed, and require consideration of the relative area, population, and assessed valuation of the annexing and annexed territories. The Commission is then to consider the past and probable future expansion of the annexing area, the availability of space to accommodate that expansion, the need for governmental services in the annexed territory, and the ability of the annexing municipality to provide them.⁴² Striking resemblances to the Missouri standards will be noted.

Even more specific standards are provided by the North Carolina statute. Generally speaking, the area to be annexed must have a population density of two persons to the acre, which is generally achievable only in sections that have been substantially platted for urban residential use, or must be sixty per cent platted into lots of which at least sixty per cent are five acres or less in size.⁴³ An analysis

1955). Under the Indiana law the annexation must be "in the best interests of the city and of the territory sought to be annexed." Apparently, either the territory to be annexed must be "urban in character" or, if undeveloped, it must be "needed for development of the city in the reasonably near future." Ind. Ann. Stat. § 48-702 (Burns Supp. 1959). For discussions of these statutes see Dixon, *op. cit. supra* note 31, at 113-120, 133-141, 306-313.

⁴⁰ Compare *City of Des Moines v. Lampart*, 248 Iowa 1032, 82 N.W.2d 720 (1957), with *State ex rel. Klise v. Town of Riverdale*, 244 Iowa 423, 57 N.W.2d 63 (1953), noted, 38 Minn. L. Rev. 170 (1954). See also *Udall v. Severn*, 52 Ariz. 65, 79 P.2d 347 (1938).

⁴¹ *Supra* note 39.

⁴² Minn. Stat. Ann. § 414.03(3) (West Supp. 1959).

⁴³ Two statutes were passed by the North Carolina legislature. N.C. Laws c. 1009 (1959), deals with annexations by municipalities having a population of 5000 or more. N.C. Laws c. 1010 (1959), deals with annexations by municipalities having a

of the law has indicated that a residential subdivision with approximately thirty homes to each 100 acres would be required before annexation under the statute became possible.⁴⁴ As compared with the other statutes that have been discussed the North Carolina law is considerably more limited, but at the same time is firmer in facilitating annexation once its more specific tests have been met.

As a group, recent annexation laws acknowledge a presumption that urban territory should be subject to urban government, but require that two general tests be met: the annexed territory must be ready for urban government, and the annexing municipality must show a need for this area. In some cases these two tests are mingled as one.

population of 5000 or less. The discussion in the text is based on the first of these laws.

As the basis for this differentiation in treatment, the legislature found as a matter of policy that urban development around the larger municipalities is "more scattered than in and around smaller municipalities" and that larger municipalities accordingly have greater difficulty in extending municipal services. "Legislative standards governing annexation . . . must take these facts into account." N.C. Laws c. 1009, § 1(d) (1959). Differences in treatment as between the two laws come primarily in the section governing the character of the area to be annexed. Section 4(c) of the law governing the larger municipalities provides that "Part or all of the area to be annexed must be developed for urban purposes." To pass this test, the area must meet any one of the following standards:

- "(1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; or
- "(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty per cent (60%) of the total acreage consists of lots and tracts five acres or less in size and such that at least sixty per cent (60%) of the total number of lots and tracts are one acre or less in size; or
- "(3) Is so developed that at least sixty per cent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty per cent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size."

An interesting ancillary provision in § 4(d) of this law recognizes the tendency of builders to leapfrog large open areas in order to create isolated residential subdivisions in the countryside. This subsection permits the annexation of an open, undeveloped area which either lies between or is adjacent to the municipal boundaries and a developed urban area as defined above. No comparable provision appears in the law governing the smaller municipalities.

⁴⁴ Esser, "Legislation of Interest to Municipal Officials," 25 Popular Government No. 9, 14, 16 (June 1959). He also notes the legislature's reliance on density standards as the test for annexation, admitting that the standards are drawn so high as to prevent the annexation of undeveloped territory beyond the urban area but which is ripe for development. However, he feels that municipalities may safely extend services to these areas because the law insures that they may be annexed once they have been developed.

The laws differ, however, as to the particularity with which they define and elaborate these standards, and thus in the scope and discretion which they confer on the agencies which are to make the ultimate decision. Perhaps a casting of the discussion in terms of generality as compared with specificity is false. Each of the statutes under discussion is specific, but each is specific as to different questions. Perhaps a legislative codification of the essence of the Missouri decisions is most desirable. This may be done, as in the case of the Minnesota law, by detailing a series of standards relating qualitatively to the characteristics of the area to be annexed and to the needs of the annexing municipality. Or it may be achieved, as in North Carolina, by the use of legislative standards which measure quantitatively the readiness of the area for annexation. Basically, the statute must recognize that the city casts its shadow before it, and must legislate accordingly.

Apart from imposing positive requirements as prerequisites to annexation, recent legislation has also sought to ensure that annexation confers benefits on the annexed area in return for taxes received.⁴⁵ All enact provisions to ensure that municipal services will be extended to the annexed area, and some go to elaborate measures to see that this is so. North Carolina, for example, requires the filing by the annexing municipality of a plan for the extension of vital services, and then provides for an action in mandamus by an objecting property holder if these services are not provided within twelve months time.⁴⁶ As a corollary to the proposition that urban territory requires urban government, these provisions are logically sound.

Nevertheless, their practicability may be open to question. A Missouri court⁴⁷ has held that the annexing municipality need only extend the services it is already providing to its own citizens. If the service level of the annexing municipality is poor, boundary extension may depress rather than enhance the quality of local government in the area. There may be reasons for annexation other than the provi-

⁴⁵ These provisions reflect legislative recognition of the minority judicial view, first developed in annexation cases, that to include land within the municipal limits and to tax it at the municipal rate without conferring municipal benefits is a "taking" without just compensation. Standards, *supra* note 12, at 280, 281.

⁴⁶ N.C. Laws c. 1009, § 5 (1959). In Virginia the annexation court continues in existence for five years and may reconvene during this period if the municipality fails to carry out its obligations to the annexed area.

⁴⁷ *City of St. Ann v. Buschard*, 299 S.W.2d 546 (Mo. App. 1957). This case simply reflects the somewhat unfortunate tendency of the Missouri courts freely to permit annexations by suburban municipalities, even though the result may be to perpetuate further the balkanization of the metropolitan area. Similar tendencies are evident in the Missouri incorporation cases. See *State ex rel. H. B. Deal & Co. v. Stanwood*, 208 S.W.2d 291 (Mo. App. 1948).

sion of municipal services; the extension of zoning and health ordinances afford one example. As a matter of timing, it may not be possible to force the extension of all the necessary municipal services within a rigid statutory period even though the annexation may be proper on other grounds.

The requirement that benefits be conferred for taxes received may also present administrative problems. For example, the provision in the Indiana law that taxes raised in the annexed area be impounded for its use gives rise to difficult questions of administration and may impair the flexibility of the municipality's financial program as several "trust fund" areas become attached to the city after a time.⁴⁸ These questions must be considered in light of the general adequacy of annexation procedures. Most recent legislation, recognizing the weakness of a method under which annexations are decided by the voters in the affected area, have chosen an impartial agency to make the final decision. In the states reviewed here this agency for all practical purposes has been the judiciary, as it provides the disinterested forum for the review of the annexation ordinance, which really stands as a claim by one of the parties in interest. While this choice is perhaps dictated by the absence of a feasible alternative, and by a history of judicial supervision of local government in America, its advisability in this context has been questioned.⁴⁹

One most pressing problem involves the delay that has often been associated with annexation proceedings. Some statutes, as in Indiana, provide for the filing of a remonstrance by a majority of the property owners in the annexed area, and this requirement has brought administrative complications because of the difficulty in determining whether or not a true majority of the owners do in fact object. Under legislation in force in Kentucky the burden of proof depends on the percentage of residents objecting, and trial courts both there and in Indiana have been known to conduct elections and lengthy examinations of local sentiment in order to make a determination of the percentage of residents protesting.⁵⁰

Other statutes allow the filing of a remonstrance by any affected property owner in the territory annexed, or as in Missouri require the

⁴⁸ Ind. Ann. Stat. § 48-702 (Burns Supp. 1959). On the possible binding effect of municipal promises made in conjunction with an annexation see *Pitzer v. City of Abilene*, 323 S.W.2d 623 (Tex. Civ. App. 1959). The court upheld an agreement not to annex an area for a period of three years which had been given in return for a promise to call off an election to incorporate the territory.

⁴⁹ Bain, "Annexation: Virginia's Not-So-Judicial System," 15 Pub. Admin. Rev. 251 (1955).

⁵⁰ The writer's attention has been directed to the use of such procedures in Lexington, Kentucky and Indianapolis, Indiana.

municipality to file a suit to test the validity of the annexation. These procedures have simply made judicial review routine, with the result that cities seeking to annex have been subject to long trials and longer appeals.⁵¹ In one case in Missouri the trial took 45 days and the entire process from ordinance to final supreme court approval took three years.⁵² While the review of annexation proceedings cannot be hurried, the problems involved in the long delay over the annexation of a fast-growing area cannot be minimized. In an effort to speed the consideration of annexation cases, the Kentucky Municipal League has recommended legislation that would enable the court to facilitate the simplification of issues, the stipulation of facts, and the limitation of expert witnesses.⁵³

Helpful though they might be, however, palliatives such as these cannot provide the entire answer. For one thing, court procedures are particularly awkward in the case of conflicts between annexation petitions, or between annexation and incorporation petitions. Faced with these conflicts, most courts have fallen back on the priority rule, and have given precedence to the petition which is filed first, regardless of its merits.⁵⁴ A few statutes and at least one court have recognized that the problem cannot be solved as easily as this, and that the merits must be allowed to decide in cases of conflict.⁵⁵

⁵¹ Present Iowa procedure requires the municipality to file a suit in equity to test the annexation, and the following experience has been given as typical: "Our suit in equity was filed in August, 1956. Since that time we have had approximately 40 hearings in the District Court and have been before the Supreme Court of Iowa in connection with applications, motions or appeals a total of 10 times." Letter to the writer from C. W. Garberson, formerly City Attorney, Cedar Rapids, Iowa, February 11, 1959. Difficulties had also been experienced in seeking out the names of all the property owners who had to be made defendants. Missouri practice permits a class action. E.g., *City of Fulton v. Dawson*, 325 S.W.2d 505 (Mo. App. 1959). The Iowa legislature was offered a bill which would have permitted an appeal by "Any owner of property in the annexed area."

⁵² Letter to the writer from Stanley I. Dale, formerly Mayor, St. Joseph, Missouri, August 8, 1959.

⁵³ Legislation—An Aid to Efficient Government in Kentucky Cities, 1960 Program of the Kentucky Municipal League, 4-6.

⁵⁴ See the discussion in *State ex rel. Industrial Properties, Inc. v. Weinstein*, 306 S.W.2d 634 (Mo. App. 1957). A related problem involves the municipality that seeks to circumvent the incorporation laws by organizing as a small area and by then attempting an immediate large-scale expansion through annexation. Often the annexation will fall under the tests laid down in the annexation laws, and in *Hardin v. City of St. Matthews*, 240 S.W.2d 554 (Ky. 1951) the court noted further that the legislature contemplated their use of these laws by a city with a substantial history. In this case a small city of 300 had attempted, a few hours after its incorporation, the annexation of an area 33 times its size and 50 times its population.

⁵⁵ *Chastain v. City of Little Rock*, 208 Ark. 142, 185 S.W.2d 95 (1945); Va. Code § 15-152.7 (Supp. 1959). A recent Tennessee law gives precedence to the an-

What has been said of annexation applies as well to incorporation proceedings, which are handled in the first instance by courts or by local quasi-administrative bodies such as the Indiana County Commissioners. The deficiencies of these agencies for this purpose have been detailed elsewhere, and the writer has suggested the use of an administrative agency on the state level which can develop the expertise necessary to handle incorporation problems outside the confining framework of a quasi-litigative process. Minnesota's solution, which fortunately applies this approach both to annexations and incorporations, is the first American effort in this direction. It can be adapted to provide the supervision which is necessary to insure municipal performance following an incorporation or annexation, and affords the framework for a positive and broad-scale approach to the questions of local government organization.

REVIEWING LOCAL GOVERNMENT ORGANIZATION

Some consideration of the English administrative experience in the area of local government review may again give perspective to American trends. As indicated earlier, boundary commissions at the national level have been responsible for the adjustment of county boundaries, the approval of boundary extensions submitted by cities, and the creation of new county boroughs.⁵⁶ In England as in Virginia the large cities are organized as county boroughs, which are local government units administratively distinct from the counties. This separation has produced intergovernmental tensions in England that have made adequate boundary adjustments difficult if not impossible, and the national commissions have been somewhat immobilized by the conflicting demands of the various local government organizations.

This impasse has resulted in the creation recently of two national commissions, one for Greater London and one for the rest of England, which are to review local government structure and to make proposals to Parliament for necessary changes. Regulations have been enacted to govern the Local Government Commission for England, and similar standards are acknowledged to govern the Royal Commission for Greater London, which was created by Royal Proclamation.⁵⁷ In content these regulations are quite similar to the recent American legislation that has been discussed in this article,

nexation proceedings of the larger municipality. See Tenn. Code Ann. §§ 6-308-6-310, 6-313-6-315, 6-317-6-319 (1955).

⁵⁶ For the most recent legislation, creating two Local Government Commissions, one for Wales and one for England exclusive of the Greater London area, see Local Government Act, 6 & 7 Eliz. 2, c. 55 (1958).

⁵⁷ For the regulations governing the Local Government Commissions see Stat. Instr., No. 2115 (1958).

except that they are quite explicit that the Commission is to have regard to the effective and convenient organization of local government throughout the review areas.⁵⁸ Unfortunately, the national government has taken a rather restricted view of the functions of the Commissions, and has indicated that no major surgery on English local government institutions is needed.⁵⁹ With Greater London now governed, as an example, by 100 local borough councils, this position seems something of an understatement.⁶⁰

While the results to be achieved by the current English local government reviews may fall short of the mark,⁶¹ this administrative structure does furnish a model toward which recent American legislation is obviously tending. For this reason, a summary of the main assumptions underlying the English system may be worthwhile:

(1) It recognizes that the problems of incorporation and annexation are but part of the larger question of local government organization;

(2) It pitches the resolution of these conflicts on a national level in order to transcend local interests;

(3) It recognizes that the determination of these questions requires full and detailed consideration on a positive level outside the limiting confines of petitions, ordinances, and lawsuits. Within this

⁵⁸ Under the statute the Local Government Commission may propose any changes thought to be "desirable in the interests of effective and convenient local government." Local Government Act, 6 & 7 Eliz. 2, c. 55, § 17 (1958). Section 7 of the regulations lists nine factors, placed purposely in alphabetical order, which are to be taken into account in the making of any local government review:

"(a) Community of interest;

(b) Development and expected development;

(c) Economic and industrial characteristics;

(d) Financial resources measured in relation to financial need;

(e) Physical features, including suitable boundaries, means of communication and accessibility to administrative centres and centres of business and social life;

(f) Population—size, distribution and characteristics;

(g) Record of administration of the local authorities concerned;

(h) Size and shape of the areas of local government;

(i) Wishes of the inhabitants."

⁵⁹ Ministry of Housing and Local Government, *Areas and Status of Local Authorities in England and Wales*, Cmd. 9831 (1956).

⁶⁰ "What's Wrong With Local Government?" *The Economist*, 401, 412, January 30, 1960.

⁶¹ For example, the Birmingham conurbation or metropolitan area contains 28 local government areas which govern 2½ million people. But the Commission recommends no regional government except for a joint board to deal with "overspill," i.e., the resettlement of excess population resulting from population growth, slum clearance, and redevelopment. Local Government Commission for England, *West Midlands Special Review Area, Statement of Draft Proposals* (1960).

framework, permissive incorporation and annexation of the American variety becomes a luxury that can no longer be tolerated. A legislative decision not subject to court review may be too foreign to the American experience, and might be questionable on other grounds, but the advantages of avoiding the combative confines of a lawsuit for the resolution of these questions is obvious.

(4) It recognizes that the determination of these questions should be conducted on a large scale and not on a piecemeal basis, and that the decision should have a semi-permanent character. On the last point, the current English reviews will attempt to forecast future trends for a considerable period, as additional changes will be foreclosed for a period of fifteen years. This assumption contrasts with the American pattern in which unincorporated suburban areas serve as a chessboard for a continual game of chess among so many individual chessmen in the form of a welter of ordinances and petitions.

The Minnesota Municipal Commission has been created with similar though narrower powers, and in addition is enabled positively to initiate the incorporation or annexation of all or part of a township which has a population over 2000.⁶² An imaginative exercise of this power will enable the Minnesota Commission to take a positive lead in the organization of local government in urban areas. The question remains whether American legislation on incorporation and annexation should emulate the English model. One point does seem clear. American Legislatures will soon be faced with fundamental decisions on the reorganization of local government. Since incorporation and annexation legislation in most states currently favors fractionation, a do-nothing policy will only encourage this trend.

But a state seeking to alter this trend of events faces difficult decisions, as this article has shown. Substantively, the notion of community seems as convenient a starting point as any for the resolution of these issues, both in terms of incorporating a new municipality and in terms of extending an existing one. The standards to be picked to give meaning to this general test are a matter for local choice, although the definition of community in light of regional considerations seems essential. Here the English experience bears out the recent tendency to establish criteria on a general and quali-

⁶² Minn. Stat. Ann. § 414.05 (West Supp. 1959). As a unit of rural government interposed between the county and the incorporated municipality the township is largely anomalous in urban areas. The Municipal Commission is authorized to act following a state or federal census, and may order an incorporation subject to an election but may decree an annexation on its own authority.

tative level and to leave their elaboration to the decision of individual cases.⁶³

The writer would still favor the creation of administrative commissions on the Minnesota model, coupled with the usual court review of commission findings. Administrative independence arising out of a traditional separation of powers may avoid the political influences which have somewhat limited the effectiveness of the English counterpart. In some respects, however, the range of the American commissions may have to be expanded. Because of the delays and difficulties involved in a piecemeal approach, with annexation and incorporation fights constantly recurring in each metropolitan area, the commissions may also have to undertake a large-scale review on the English model. If the review is followed by an appropriate and reasonable moratorium on further changes, and if it is sufficiently far-seeing, then the problem of benefits conferred will be subordinated to the larger issues of governmental organization in a metropolitan area. This comment also suggests that issues arising out of conflicting claims may be likewise subordinated, and may ultimately disappear as a distinct problem.

As a practical solution, however, the one just suggested has its limitations. Central direction in this area is a new concept to American local government, and perceptible rigidities in the English system caution against its uncritical acceptance. The more limited Minnesota experiment will be watched with interest. In the meantime, legislation modelled on the statutes discussed in this article will at least permit the more rational organization of government in metropolitan areas.

⁶³ A full discussion of the history of county borough extensions under earlier legislation will be found in First Report of the Royal Commission on Local Government, Constitution and Extension of County Boroughs, Cmd. 2506, 157-163 (1925).